

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

VELMURGAN JAYAPPAUL,)	
)	
Plaintiff,)	C.A. No. 2006-11-505
)	
v.)	ARBITRATION
)	
AYYANAR BALAMURUGAN,)	
)	
Defendant.)	

**Submitted: June 11, 2009
Decided: July 9, 2009**

On Defendant's Motion to Dismiss Pursuant to CCP Civil Rule 12(b)(6).
GRANTED.

MEMORANDUM OPINION AND ORDER

Donald L. Gouge, Jr., Esquire, 800 King Street, Suite 303, P.O. Box 1674, Wilmington, DE 19801, *Attorney for Plaintiff*

Douglas A. Shachtman, Esquire, 1200 Pennsylvania Avenue, Suite 302, Wilmington, DE 19806, *Attorney for Defendant*

ROCANELLI, J.

This matter is before the Court on the Motion to Dismiss pursuant to Court of Common Pleas Civil Rule 12(b)(6) filed by Ayyanar Balamurugan ("Defendant").¹ This is the Court's decision granting Defendant's Motion to Dismiss.

¹ On May 8, 2009, following a hearing on the motion, this Court reserved decision and permitted the parties to submit supplemental written arguments. On May 28, 2009, Plaintiff submitted a Supplemental Response in Opposition to Defendant's Motion to Dismiss. On June 11, 2009, Defendant submitted Defendant's Reply in Support of His Motion to Dismiss.

Facts²

With a third person who is not a party to this lawsuit, Plaintiff and Defendant formed a corporation, Café Chettinad, Inc., which operated two restaurants. Plaintiff had a fifty-five percent (55%) interest in the corporation; Defendant had an eleven percent (11%) interest; the third individual, who is not a party in this action, held the remaining thirty-four percent (34%) interest. Defendant was the chef of one of the restaurants operated by the corporation. According to the Department of State/Division of Corporations (attached as Exhibit C to Defendant's Motion to Dismiss), Café Chettinad, Inc. was declared void on March 1, 2008.

Plaintiff's Allegations

This matter concerns an action for alleged conversion of corporate assets in 2005 and 2006 and for alleged mismanagement of the corporation. Plaintiff alleges (1) forgery of checks by Defendant without authorization from an account to which Plaintiff is the only signatory; (2) conversion of cash by Defendant for personal use; (3) conversion of funds by Defendant to purchase a vehicle titled in his name; (4) deposit of catering checks by Defendant into his own personal account; (5) a four-month vacation taken by Defendant which caused the corporation to decline; and (6) change of the name of one of the restaurants by Defendant as well as other misconduct by Defendant resulting in the loss of substantial amounts of money to Plaintiff.

Plaintiff contends that he has personally lost his investment in the amount of \$85,000. Plaintiff also claims that Café Chettinad, Inc. lost the amount of \$58,129 due to Defendant's actions.

² Except as otherwise noted, for the purposes of the Court's consideration of Defendant's Motion to Dismiss, the Court accepts the facts as stated in the Complaint.

Analysis

The basis for Defendant's Motion to Dismiss is that relief cannot be granted on the Complaint because the claims should have been asserted by the corporation Café Chettinad, Inc. and not by Plaintiff individually. Plaintiff argues that he personally suffered injury – the loss of his investment – due to Defendant's alleged conduct. Plaintiff further contends the dispute at issue in the present matter concerns a contract between the parties individually, not the corporation, and any benefit from the litigation would be received by Plaintiff not the corporation because the corporation is not a party to the contract.

The Delaware Supreme Court has articulated the law to be applied in determining whether a stockholder's claim is derivative or direct “must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?”³ Application of this test to the facts presented herein mandate the conclusion Plaintiff's claims are derivative and not direct.

First, the corporation suffered the alleged harm. Any injury suffered by Plaintiff is not independent of injury suffered by the other shareholders or by the corporation. Plaintiff has no separate contractual rights owed to him individually. Any duties owed to Plaintiff are due to him as a shareholder of Café Chettinad, Inc. and proportionate to his ownership interest therein.

Second, the corporation would receive the benefit of any recovery. Under the circumstances presented in the Complaint, as a 55% owner of the corporation, Plaintiff is

³ *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A. 2d 1031, 1033 (Del. 2004) (emphasis in original).

entitled only to 55% of any funds recovered from the Defendant. Plaintiff is not entitled to 100% of the recovery because any recovery would have to be split according to the shareholders' respective ownership interests.

Conclusion

The claims by Plaintiff are derivative in nature and not direct. Plaintiff is not entitled to pursue the claims directly. Therefore, Defendant's Motion to Dismiss must be granted on the grounds the Complaint fails to state a claim upon which relief can be granted pursuant to Court of Commons Pleas Civil Rule 12(b)(6).

For the foregoing reasons, Defendant's Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

Andrea L. Rocanelli

Andrea L. Rocanelli, Judge